

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:WR:SCA:LN:TL-N-6278-99

JMMarr

date:

to: Ethelyn McDaniel, Case Manager, Examination Division CE:1105  
Patricia Lozano, Team Coordinator, Long Beach POD CE:1105

from: Joyce M. Marr, Attorney  
June Y. Bass, Assistant District Counsel  
Southern California District Counsel, Laguna Niguel

---

subject:

Tax Years , , , , , and  
TIN:

DISCLOSURE STATEMENT

*This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.*

*This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.*

*This is in reply to your telefax dated October 19, 1999, requesting advice on how to secure valid consents to extend the statute of limitations on assessment of withholding taxes against two dissolved subsidiaries of*

[REDACTED], specifically [REDACTED]  
[REDACTED] and [REDACTED].

### ISSUES

Who can execute a consent to extend the statute of limitations for assessment of withholding tax liabilities under Chapter 3 of the Internal Revenue Code against [REDACTED], a dissolved Delaware corporation, for the taxable years [REDACTED] through [REDACTED], inclusive?

Who can execute a consent to extend the statute of limitations for assessment of withholding tax liability under Chapter 3 of the Internal Revenue Code against [REDACTED], a dissolved Delaware corporation, for the taxable year [REDACTED]?

### CONCLUSION AND RECOMMENDATIONS

Both [REDACTED] and [REDACTED] continue to exist for the purpose of winding up business affairs and may enter into valid consents extending the period of limitations to assess withholding tax liability under Chapter 3 of the Internal Revenue Code. The proper person to execute such consent for a dissolved Delaware corporation is any duly authorized officer of the corporation.

The Forms 872 which you secure should indicate that the "Kind of tax" to which they pertain is "withholding tax under sections 1442-1464."

Since the names of both corporations were changed before they were dissolved, the Form 872 for each corporation should contain the corporation's old name and new name, e.g., "[REDACTED], formerly [REDACTED]." in the body of the consent and above the corporate officer's signature block.

### FACTS<sup>1</sup>

---

<sup>1</sup>Our understanding of the facts of this case is based upon information provided in telefaxes and other documents received

[REDACTED] ([REDACTED]) and [REDACTED] ([REDACTED]) were wholly-owned subsidiaries of [REDACTED] ([REDACTED]). A [REDACTED] corporation, [REDACTED] ([REDACTED]), owned [REDACTED] percent of the stock of [REDACTED].

[REDACTED] was a Delaware corporation. On [REDACTED], a Certificate of Amendment was filed with the State of Delaware Office of the Secretary of State, providing for the change of the name of [REDACTED] to [REDACTED]. A Certificate of Dissolution to be effective on [REDACTED], was filed on [REDACTED], by [REDACTED] with the Delaware Secretary of State.

[REDACTED]'s Plan of Complete of Liquidation provided for the distribution of its "remaining assets" as follows:

The Company shall pay, or shall make adequate provision for payment of, all known liabilities of the Company not previously assumed by [REDACTED] ([REDACTED]) or [REDACTED] ("[REDACTED]") and shall set aside such additional amount as the proper officers of the Company determine to be reasonably necessary for payment of unascertained or contingent liabilities of the Company not previously assumed by [REDACTED] or [REDACTED]. The balance of the assets, if any, shall be distributed to the Company's sole stockholder, in cash, in complete cancellation of the Company's issued and outstanding shares of stock.

[REDACTED] was a Delaware corporation. Dissolution of [REDACTED] was authorized on [REDACTED]. On [REDACTED], a Certificate of Amendment was filed with the State of Delaware Office of the Secretary of State, providing for the change of the name of [REDACTED] to [REDACTED]. A Certificate of Dissolution to be effective on [REDACTED], was filed on [REDACTED], by [REDACTED] with the Delaware Secretary of State.

[REDACTED]'s Plan of Complete Liquidation

---

from, and telephone conversations with, Team Coordinator Patricia Lozano. If the actual facts are different from those stated herein, our legal conclusions and recommendations might be different.

provided for the distribution of its "remaining assets" as follows:

The Company shall pay, or shall make adequate provision for payment of, all known liabilities of the Company not assumed by [REDACTED] (" [REDACTED] ") and shall set aside such additional amount as the proper officers of the Company determine to be reasonably necessary for payment of unascertained or contingent liabilities of the Company not assumed by [REDACTED]. The balance of the assets, if any, shall be distributed to the Company's sole stockbroker, in cash, in complete cancellation of the Company's issued and outstanding shares of stock.

[REDACTED] was another wholly-owned subsidiary of [REDACTED].

[REDACTED], [REDACTED] and [REDACTED] were included on consolidated Federal income tax returns filed by [REDACTED]. [REDACTED] was dissolved in [REDACTED]. Its assets were distributed to [REDACTED]. [REDACTED] has been designated as representative of the former affiliated group pursuant to Treas. Reg. § 1.1502-77(d).

For each of the years [REDACTED] through [REDACTED], inclusive, [REDACTED] filed Form 1042 (Annual Withholding Tax Return for U.S. Source Income of Foreign Persons).<sup>2</sup>

With respect to the Service's examination of the Forms 1042 filed by [REDACTED] for the years [REDACTED] through [REDACTED], inclusive, the following Consents to Extend the Time to Assess Tax (Forms 872) have been executed:

Year	Person Executing on Behalf of Taxpayer	Date Executed For Taxpayer	The Service	Date to Which Statute Extended
[REDACTED]	Treasurer	[REDACTED]	[REDACTED]	[REDACTED]
	Treasurer	[REDACTED]	[REDACTED]	[REDACTED]
	Treasurer	[REDACTED]	[REDACTED]	[REDACTED]
	Treasurer	[REDACTED]	[REDACTED]	[REDACTED]

<sup>2</sup>The Form 1042 for [REDACTED] was filed on or before [REDACTED]. The dates on which the other Forms 1042 were filed by [REDACTED] have not been made known to us; however, as addressed below, the dates on which they were filed do not affect the conclusions reached in this opinion.

[illegible]

For the year [REDACTED], [REDACTED] filed a Form 1042 on [REDACTED]. With respect to the Service's examination of the Form 1042 filed by [REDACTED] for the year [REDACTED], the following Consent to Extend the Time to Assess Tax (Form 872) has been executed:

Year	Person Executing on Behalf of Taxpayer	Date Executed For Taxpayer	Date to Which The Service Statute Extended
	Treasurer		

Each of the Forms 872 listed above indicates that the "Kind of tax" to which it pertains is "Income tax to be paid at source (under Chapter 3 of the Internal Revenue Code) due on Form 1042."

It has been represented to Team Coordinator Patricia Lozano that no trustee or receiver has been appointed pursuant to 8 Del. Code § 279 to take charge of the property of either [REDACTED] or [REDACTED].

## DISCUSSION

The general rule under I.R.C. § 6501(a) is that an assessment of tax must be made within three years after the return is filed. Code Section 6501(c)(4), however, provides that the taxpayer and the Secretary can consent to an extension of the assessment period by a written agreement executed prior to expiration of the statute of limitations on

assessment.

The payor of income subject to withholding under section 1442 is required to file an annual return of the tax required to be withheld, Form 1042, on or before March 15 of the year following the calendar year in which the tax was required to be withheld. Treas. Reg. § 1.1461-2(b), effective before 1/1/2000.

Section 6501(b) provides for the determination of when a return is deemed filed for purposes of section 6501. Section 6501(b)(2) specifically provides as follows with respect to returns of tax imposed by Chapter 3 (i.e. sections 1441 - 1464) of the Internal Revenue Code:

For purposes of this section, if a return of tax imposed by chapter 3 . . . for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

Given the foregoing rules, the Forms 872 listed under the heading "FACTS," have validly extended to [REDACTED], the 3-year period of limitations under section 6501(a) for [REDACTED]'s Forms 1042 for the years [REDACTED] through [REDACTED], inclusive, and [REDACTED]'s Form 1042 for the year [REDACTED]. Thus, if [REDACTED] and [REDACTED], which are dissolved corporations, may enter into valid consents extending the periods of limitation to assess withholding tax under section 1042, the periods of limitation may be further extended by written agreements executed before [REDACTED].

With respect to a dissolved corporation, the authority of a person to execute an agreement to extend the statute of limitations on behalf of the corporation is determined under the law of the state of incorporation. United States v. Krueger, 121 F.2d 842, 845 (3rd Cir. 1941), cert. denied, 314 U.S. 677 (1942); McPherson v. Commissioner, 54 F.2d 751 (9th Cir. 1932).

[REDACTED] and [REDACTED] were organized pursuant to the law of Delaware, which authorizes a corporate officer to act for a specified period of three years after the date of dissolution, in order to wind up the corporation's affairs. 8 Del. Code § 278 provides as follows:

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. . . .<sup>3</sup>

In a case involving a predecessor provision under Delaware law, the Board of Tax Appeals held that the officer of a dissolved corporation had authority to extend the period of limitation to a date beyond the end of the winding-up period, provided that the extension was executed within the period. H.D. Waldbridge & Co. v. Commissioner, 25 B.T.A. 1109 (1932).

Settlement of a corporation's tax liabilities is an integral part of the winding up process. Therefore, during the three-year winding-up period, [REDACTED] and [REDACTED] can continue to have consents executed on their behalf to extend the statute of limitations on assessment of withholding taxes imposed under Chapter 3 of the Internal Revenue Code. The Service has specifically ruled that where state law continues the existence of a dissolved corporation for purposes of winding up its affairs, any authorized officer of the corporation may execute a consent to extend the time for assessment of tax during the period the corporation continues in existence under state law. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified by Rev. Rul. 84-165, 1984-2 C.B. 305.

Applying these precedents to the present situation, consents to extend the statute of limitations executed by

---

<sup>3</sup> We note that 8 Del. Code § 279 allows appointment of a receiver or trustee to take charge of the dissolved corporation's property, with power to prosecute and defend suits. It has been represented that no trustee or receiver has been appointed to take charge of either [REDACTED] or [REDACTED].

officers of [REDACTED] and [REDACTED] within the three-year winding-up periods for the corporations would be effective to extend the statute of limitations on assessment of withholding taxes under Chapter 3 of the Internal Revenue Code against the corporations.

The Forms 872 which you secure should indicate that the "Kind of tax" to which they pertain is "withholding under sections 1442-1464." Because the Service has successfully argued that the income tax liability and the withholding tax liability under section 1461 are separate and distinct taxes for purposes of issuing a notice of deficiency,<sup>4</sup> the use of the term "income" on the Forms 872 which previously have been secured from [REDACTED] and [REDACTED] with respect to withholding taxes for the years in question may be perceived as a defect. However, the references on the Forms 872 to Form 1042 make it clear that the Forms 872 were extending the period of limitations for assessment of income tax withheld by [REDACTED] and [REDACTED] on foreign persons.

As noted above under the heading "FACTS," the names of both [REDACTED] and [REDACTED] were changed before the corporation's were dissolved. When a corporation changes its name, both the original corporate name and the new corporate name should appear in the body of the Form 872 and be typed in by the government above the corporate officer's signature block.

During the three-year winding up period provided by 8 Del. Code § 278, a corporation may do that which is necessary to bring its former business affairs to a conclusion. These powers include bringing suit, as well as defending suits brought by others. While the execution of a waiver appears to be incident to the winding up of the affairs of a corporation, the execution of a waiver does not constitute the commencement of a suit or proceeding. Rather, it is the service of a notice of deficiency that constitutes the commencement of a suit or proceeding. See Ross v. Venezuelan-American Indep. Oil Producers Ass'n., 230 F. Supp. 701 (D. Del. 1964). Accordingly, in order for the Service to comply with Section 278, any notice of deficiency must be served within the three year winding up period.

---

<sup>4</sup>See S-K Liquidating Co. v. Commissioner, 64 T.C. 713 (1975), and InverWorld, Ltd. v. Commissioner, 98 T.C. 70 (1992), aff'd, 979 F.2d 868 (D.C. Cir. 1992).

Please contact the undersigned at (949) 360-2688 if you have any questions concerning the foregoing.

---

JOYCE M. MARR  
Attorney